

IT IS SO ORDERED.

Dated: June 12, 2007
09:38:10 AM


Honorable Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:

PHAR-MOR, INC., et al.,

Debtors.

CASE NUMBER 01-44007

HONORABLE KAY WOODS

ORDER GRANTING DEBTORS' MOTION TO COMPEL
PRODUCTION OF EXPERT WITNESS DOCUMENTS
NOT INTENDED FOR NATIONAL PUBLICATION

The following order is not intended for national publication and carries limited precedential value. The availability of this opinion by any source other than www.ohnbuscourts.gov is not the result of direct submission by this Court. The opinion is available through electronic citation at www.ohnb.uscourts.gov pursuant to the E-Government Act of 2002 (Pub. L. No. 107-347).

This cause is before the Court on Debtor's (sic) Motion for an Order to Compel Production of Expert Witness Documents (Doc. # 2757) ("Motion to Compel") filed by Debtors Phar-Mor, Inc. et al.

(collectively, "Debtors") on May 21, 2007. McKesson Corporation ("McKesson") filed McKesson Corporation's Opposition to the Debtor's (sic) Motion to Compel Production of Expert Witness Documents (Doc. # 2766) ("McKesson Response") on May 29, 2007.

In the Motion to Compel, Debtors argue that McKesson failed to produce all communications between McKesson and its counsel and the experts retained by McKesson. Debtors state that they requested in writing all communications McKesson and its counsel had with the McKesson experts, Capstone Consulting ("Capstone") and/or The Brattle Group ("Brattle"). (Motion to Compel at 2.) Debtors state that McKesson failed to produce all such communications and that such communications must be disclosed and produced by McKesson to Debtors. (*Id.*) Debtors state that McKesson's counsel interpreted the term "expert" to mean only the specific individuals who signed the Expert Reports, but such definition did not include the partners or associates of those particular individuals. (*Id.* at 1-2.) As a consequence, Debtors move the Court for an order compelling McKesson to produce all drafts or communications between McKesson and/or its counsel and all individuals at Capstone and/or Brattle.

McKesson opposes the Motion to Compel on the grounds that McKesson hired (i) Christopher J. Kearns, a Capstone employee and (ii) Philip Q. Hanser, a Brattle employee, as testifying experts and that these experts "never saw, read, reviewed, relied upon, or considered" certain documents that were provided by McKesson to Capstone and Brattle staff. (McKesson Response at 2.) McKesson argues that the "staff, but not the experts, culled documents which were not germane to each experts' (sic) undertaking." (*Id.*)

McKesson argues that exclusion of the culled "documents from disclosure does not prevent opposing counsel from cross examining the expert[s] as to why he/she (sic) failed to consider this document or that document, if he/she (sic) allegedly should have." (*Id.* at 4.) McKesson maintains that Federal Rule of Civil Procedure 26(a)(2) only requires that an expert disclose the "data or information considered 'by the witness'." (*Id.*) Because the experts did not review the culled documents, McKesson concludes that the experts did not "consider" such information and, accordingly, such documents need not be produced to Debtors.

McKesson attaches several declarations to its Response in support thereof. The Court's attention was caught by what was excluded from these declarations, as well as what was stated therein. For example, Kearns states, "In advance of my review of the relevant documents relied on or considered in preparing my report, McKesson's counsel provided my staff with certain documents. Without my personal involvement, my staff reviewed the documents produced by McKesson's counsel and culled documents which were not germane for my analysis." (Declaration of Christopher J. Kearns in Support of McKesson Corporation's Opposition to the Debtor's (sic) Motion to Compel Production of Expert Witness Documents ("Kearns Decl.") at ¶ 3.) Kearns fails to state the basis the staff had for culling certain documents or at whose direction such sorting and culling was done. Logically, the staff acted at the direction of someone - probably Kearns.

Additionally, Kearns states, "I did not prepare, nor did my staff prepare, any draft versions of the Expert Report or the Supplement to the Expert Report in which my opinion differed in any

way from the Expert Report or the Supplement to the Expert Report." (Kearns Decl. at ¶ 6.) McKesson concedes that the staff reviewed certain documents that were culled before Kearns reviewed such documents. Because the staff saw certain documents, it would be important to know if the staff prepared any version of the Expert Report (whether or not it "differed in any way from the Expert Report or the Supplement to the Expert Report"). Kearns fails to say that the staff did not prepare any version of the Expert Report; indeed, the wording of paragraph 6 indicates that his staff may have prepared one or more versions of such report.

Hanser makes identical statements in Declaration of Philip Q. Hanser in Support of McKesson Corporation's Opposition to the Debtor's (sic) Motion to Compel Production of Expert Witness Documents at paragraphs 3 and 6.

McKesson acknowledges that it provided certain documents to the staff of both experts. McKesson has not produced all of the "staff" documents to Debtors based on the belief that, because the staffs culled documents prior to Kearns and Hanser performing their review, such documents were not "considered" by the experts.

The Declarations of Kearns and Hanser each state that certain documents were reviewed and removed by their staffs before Kearns and Hanser reviewed documents produced by McKesson's counsel to prepare their reports. Neither Kearns nor Hanser state how their staffs made the decisions to cull certain documents or who directed the staffs in their review. Both the Kearns and Hanser Declarations imply that their staffs may have been involved in preparation of one or more versions of the Expert Reports and/or Supplements to the Expert Reports.

The staffs did not "cull" documents in a vacuum. The Capstone and Brattle staffs could only have culled documents if they had been instructed about what to look for and what Kearns or Hanser felt was important for his review. By directing the staffs and indicating what kind of documents each expert wanted to see, Kearns and Hanser were, in effect, "considering" all of the documents - whether or not they were culled prior to review by Kearns and Hanser. Debtors are entitled to know what documents were originally produced in order to effectively cross examine Kearns and Hanser about what they thought would be necessary or useful in preparing their Expert Reports.

In addition, to the extent any staff member prepared a draft of an Expert Report and/or Supplement to an Expert Report, all documents that were reviewed, but culled, were, in effect, considered by Kearns and/or Hanser in the Expert Reports.

As a consequence, the documents that were culled by the Capstone and Brattle staffs must be produced to Debtors because they fall squarely within the scope of Rule 26(a)(2)(B) as "data or other information considered by the witness in forming" the expert opinion. McKesson is ordered to produce such documents and draft reports to Debtors within ten (10) days of entry of this order.

IT IS SO ORDERED.

###